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Supreme Court of the United States
OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

—v.—

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF KAISER ALUMINUM & CHEMICAL CORPORATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF KAISER ALUMINUM & CHEMICAL CORPORATION IN SUPPORT OF PETITIONERS

Kaiser Aluminum & Chemical Corporation ("Kaiser") hereby submits this brief as *amicus curiae* in support of petitioners. All parties have consented to the filing of this *amicus curiae* brief pursuant to Rule 36.2 of the Rules of this Court. *See* letters from counsel to petitioners and counsel to respondent on file with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

Kaiser is vitally interested in the outcome of this appeal both because it will affect the resolution of a similar case to which Kaiser is a party and because Kaiser continues to conduct certain business operations through wholly-owned and commonly managed subsidiaries. Particularly in light of this latter fact, Kaiser is representative of the many business enterprises that have a direct interest in the proper resolution by this Court of the confused and counterproductive state of the law regarding the intra-enterprise conspiracy doctrine.[1]

The Court's decision in the present case will affect the outcome of *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, No. 83-1079 (3d Cir. filed Jan. 31, 1983) currently on appeal to the United States Court of Appeals for the Third Circuit, a private treble damage antitrust action in which Kaiser is a defendant and has been held liable, *inter alia*, for conspiring with its former wholly-owned subsidiary, Kaiser Aluminum & Sales, Inc. ("KASCI")[2] to restrain trade in the aluminum culvert market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Kaiser and KASCI initially obtained a directed verdict on that claim (as well as on others under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14). On appeal to the Third Circuit, the verdict was reversed in significant respects and remanded for trial. In so ruling, the Third Circuit rejected Kaiser's argument that it was incapable as a matter of law of conspiring with its wholly-owned subsidiary, KASCI, holding that such an argument was foreclosed by this Court's decisions, which the Third

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1 Indeed, because of Kaiser's strong interest in the issues raised on this appeal, it has retained specially to prepare its *amicus* brief Messrs. Handler and Smart who have written an extensive critical analysis of the intra-enterprise conspiracy doctrine.

2 KASCI has since been merged into Kaiser, has ceased to have a separate corporate existence, and its activities are now conducted directly by Kaiser.

Circuit interpreted as upholding "the viability of the 'intra-enterprise conspiracy' theory as applied to separately incorporated entities." *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). As a result, unlike Copperweld, Kaiser was not even given an opportunity on remand to try to convince the jury that it and its subsidiary KASCI were a single entity and should be treated as such, and it was held subject to Sherman Act liability for intra-enterprise conspiracy.

The present case raises basic issues that are of critical and continuing importance to Kaiser. Although Kaiser no longer operates KASCI as a subsidiary, it continues to do business through other subsidiaries. The present state of the law of intra-enterprise conspiracy creates serious problems for companies, like Kaiser, which operate throughout the United States and in foreign countries, and which desire, for a variety of legitimate business reasons, to conduct some or all of their business activities through wholly-owned subsidiaries. The conflict among the courts of appeals and district courts makes it extremely difficult, if not impossible, to determine how a company should structure parent-subsidiary and affiliate relationships to avoid potential antitrust liability for those discussions and agreements which clearly would be lawful if engaged in by a company operating through divisions. Moreover, the literal reading of this Court's past decisions, which the Third Circuit adopted in Kaiser's case, makes it virtually impossible for a parent and subsidiary to avoid antitrust exposure.

Kaiser submits that the intra-enterprise conspiracy doctrine advances none of antitrust's goals and has proven to be counterproductive and contrary to the public interest.

STATEMENT OF THE CASE[3]

This case raises the issue of whether a parent corporation and its wholly-owned subsidiary are capable of conspiring with each other in violation of Section 1 of the Sherman Act. Petitioners were found liable below for an antitrust conspiracy to induce a third party, Yoder, to cancel its contract to provide Independence with a tubing mill, which delayed its entrance into the structural steel tubing market for some nine months. Both Copperweld and Regal were found to have acted in concert to induce Yoder's breach of contract and were held liable for treble damages of almost $7.5 million. However, in the common law action only Copperweld was held to have wrongfully induced the Yoder breach, not Regal.

The Court of Appeals for the Seventh Circuit affirmed the jury's verdict, rejecting petitioners' frontal assault on the intra-enterprise conspiracy doctrine, and, curiously, applying a stricter standard of liability for single damages under the common law claim of inducing breach of contract than for treble damages under the Sherman Act claim. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982). Although recognizing the "almost uniformly critical" reception the intra-enterprise conspiracy doctrine has received from commentators and acknowledging their conclusion that it "surfaces in private suits" as a method for plaintiffs to "plead their way around basically unilateral action" which does not rise to the level of a Section 2 violation, the court of appeals nevertheless felt inhibited by this Court's prior decisions[4] from abolishing

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3 Because petitioners' brief describes the facts and proceedings below in some detail, we have limited ourselves to a brief statement of the essential facts.

4 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

the doctrine "root and branch." *Id.* at 316-18. Nonetheless, the Seventh Circuit did not apply this Court's formulation of the rule as set forth in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), but instead ostensibly substituted its own version as articulated in its prior decision *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).[5] There the court had focused on the practical relationship between the parent and the subsidiary, using a variety of factors to decide "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible." *Copperweld*, 691 F.2d at 318.

SUMMARY OF ARGUMENT

The central issue before the Court is whether the intra-enterprise conspiracy doctrine promotes the goals and objectives of antitrust law and bolsters its enforcement, or whether it is counterproductive and discourages corporations from structuring their corporate relationships in the most efficient and effective manner. It is our submission that when analysis is focused on antitrust policy as such, one can discern no need for the doctrine, its elimination would not hamper effective antitrust enforcement, and, indeed, would strengthen the forces of competition in the marketplace. Nothing in the legislative history of the Sherman Act or in this Court's early rulings interpreting the statute supports the view that Congress intended the legality of business behavior to turn on the corporate form the business chooses for the conduct of its affairs.

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5 In fact, however, the court of appeals approved a jury instruction which failed to mention three of the *Photovest* factors and substituted others not referred to in the case. *Copperweld*, 691 F.2d at 318-19.

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Serves No Useful Purpose And Should Be Abandoned.

What is most striking in this case is that none of the parties to the appeal supports the intra-enterprise doctrine as formulated by this Court in a series of decisions.[6] This includes the respondent,[7] the court below,[8] the *amici,* as well as the petitioners. Indeed, most of the circuits have substituted their own rules for that of this Court,[9] and there is virtual unanimity

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6 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

7 Respondent urges the Court to adopt a rule that distinguishes between concerted activities that relate to "internal management affairs" and those "designed to restrict the trade of third parties." On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Respondent's Brief In Opposition, Feb. 28, 1983, at 13 ("Respondent's Brief In Opposition").

8 *Copperweld,* 691 F.2d at 318.

9 Only in the First, Third, and Fifth Circuits has the rule been followed in its pristine form. *E.g.,* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978). The Seventh, Eighth, and Ninth Circuits have adopted an "all the facts and circumstances" test. *E.g.,* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-90 (8th Cir. 1981); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054 (9th Cir.), *cert. denied,* 103 S. Ct. 57 (1982); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980). Other tests include the "holding out as competitors" approach, *e.g.,* Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); the "sole decisionmaker" rule, *e.g.,* Windsor Theatre Co. v. Walbrook Amuse-

amongst scholars and commentators that *Kiefer-Stewart* and its progeny should be specifically overruled.[10] The rejection of the rule is not limited to the Chicago School of Economics, but is the view of writers covering the entire spectrum of economic and antitrust opinion. Those charged with the enforcement of the antitrust laws have consistently over the years refused to apply the Court's formulation of the doctrine[11] and, in this case, both the Department of Justice and the Federal Trade Commission are urging the Court, as are we, to abandon the doctrine altogether.

The intra-enterprise conspiracy doctrine has failed to promote the goals of antitrust, has been the source of much confusion and uncertainty, and has produced a large volume of expensive litigation, consuming a vast amount of judicial effort and time.[12] Its only accomplishment has been to compel corporations to avoid the rigors of the doctrine by converting

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ment Co., 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); and the attempt to distinguish between concerted activity aimed at outsiders and concerted activity that restrains no outsider's trade, *e.g.*, REA Express, Inc. v. Alabama Great S.R.R., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom.* Sowerwine v. United States, 431 U.S. 961 (1977).

10 The commentaries are collected in Handler & Smart, The Present Status Of The Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, n.3 (1981).

11 The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws criticized the doctrine as "unrealistic" in its expectation that wholly-owned affiliates compete. *Id.* at 35. Previous administrations have declined "to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest," Turner, Address Before the American Bar Association, 10 Antitrust Bull. 685, 687 (1965). Indeed, the Department of Justice has entered into numerous consent decrees over the years which explicitly provide that the prohibitions therein are inapplicable to activities involving a parent and its subsidiaries. The decrees are collected in Handler & Smart, *supra*, at 66 n.207.

12 *See* App. H to Petition for Writ of Certiorari, where the cases are collected.

their wholly-owned subsidiaries into divisions—a change which plainly does not advance any antitrust goal.

A. There Is No Need to Invoke the Fiction of Intra-Enterprise Conspiracy to Penalize Improper Unilateral Conduct.

Where there is monopoly power, unilateral action in willful maintenance of that power is condemned by Section 2 of the Sherman Act.[13] Section 1, conversely, is limited to concerted activity by a plurality of actors.[14] Analysis of the cases indicates that the intra-enterprise conspiracy doctrine is not needed to police behavior that is of any real concern under the antitrust laws.

In *Kiefer-Stewart* and *Perma Life*, as well as in *United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), the earliest case applying the doctrine, there were present vertical multilateral arrangements which under contemporary antitrust analysis themselves may restrain trade in violation of Section 1.[15] In the present case, the inducement of a breach of contract was actionable as a

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13 "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. Section 2 also prohibits combinations and conspiracies to monopolize.

14 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1.

15 In *General Motors*, the requirement that GM dealers finance their cars from GM's finance subsidiary was actionable as an unlawful tie-in. 121 F.2d at 402. In *Perma Life*, the requirements in the dealers' franchise agreements that they purchase exclusively from Midas and sell at fixed prices were deemed actionable by the Court as "a combination between Midas and [the dealer], as of the day he unwillingly complied with the restrictive franchise agreements . . . or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination.' " 392 U.S. at 142 (citing Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968) and United States v. Parke, Davis & Co., 362 U.S. 29 (1960)).

common law tort. A vast array of anticompetitive practices have been held unlawful by the FTC and the courts as "unfair methods of competition."[16] Moreover, to the extent unilateral conduct is taken with a specific intent to monopolize and creates a dangerous probability of success in achieving monopoly in the relevant market, Section 2's interdiction of attempts to monopolize is also available as a remedy.

The intra-enterprise conspiracy doctrine has principally been invoked in situations where there have been disputes between suppliers and customers arising out of terminations of the dealerships or refusal to deal—typical unilateral conduct protected by the *Colgate* doctrine.[17] That was the very situation presented by *Kiefer-Stewart*, where two wholly-owned subsidiaries of the Seagram corporate family, Seagram and Calvert, refused to sell to plaintiff, a wholesale liquor dealer, who would not observe the maximum prices imposed by defendants. It was only by artificially regarding the sales subsidiaries—companies handling different brands produced by the same corporate family—as separate entities that antitrust liability could be imposed—a liability which was avoided for the future by the simple expedient of Seagram's transforming the separately incorporated sales companies into unincorporated sales divisions.[18]

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16 The cases are collected and discussed in Handler & Steuer, Attempts To Monopolize And No-Fault Monopolization, 129 U. Pa. L. Rev. 125, 174-82 (1980).

17 In United States v. Colgate & Co., 250 U.S. 300, 307 (1919), this Court held that a manufacturer, acting alone, may unilaterally refuse to deal. *See* ABA Antitrust Section, Monograph No. 9, Refusals to Deal and Exclusive Distributorships (1983).

18 The courts have uniformly held that a corporation is incapable of conspiring with its unincorporated divisions. *E.g.*, H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 206 (5th Cir. 1969); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Poller v. Columbia Broadcasting Sys., 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

An examination of the some 200 cases spawned by *Kiefer-Stewart* and *Perma Life* discloses that the doctrine (a) provides a technical basis in treble damage litigation for turning otherwise lawful behavior, such as a refusal to deal, into an antitrust violation;[19] (b) duplicates an existing Section 1 remedy as in the case of vertical agreements, or an existing Section 2 remedy where the conduct at issue also constitutes an attempt to monopolize or monopolization; or (c) converts a common law tort or act of unfair competition into an antitrust infraction.

The doctrine clearly has taken seed and grown in private actions because it is easier to prove a violation of Section 1 than Section 2. To the extent that there may be a need to extend the scope of the Sherman Act to behavior not covered by Sections 1 and 2 of the Act—a need which we do not believe exists—the intra-enterprise conspiracy doctrine does not seem appropriate for the task. For the rule only reaches behavior not rising to the level of a Section 2 violation in the circumstance where a parent operates through a subsidiary with which an agreement can be artificially alleged. The same behavior engaged in by a company in concert with its unincorporated division is not reached. If the Sherman Act is to be expanded to cover such behavior, a more evenhanded and less fortuitous approach should be devised.

B. There Is No Sound Basis for Distinguishing Agreements Between Corporations and Divisions on the One Hand, and Corporations and Subsidiaries on the Other.

As we have seen, the courts have uniformly held that a corporation cannot conspire for the purposes of Section 1 of the Sherman Act with its own divisions. The reason is that any other approach would be unworkable as a matter of business

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19 The rule enables plaintiffs to plead an antitrust action that will survive a motion to dismiss. While the cases are more often than not lost, the ensuing litigation is extremely wasteful and burdensome and serves no useful purpose.

practice. In *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), the Ninth Circuit emphasized that no corporation of any size can operate without divisions and that sound management requires delegation of authority within an organization. At the same time, it is inevitable that corporate divisions, no matter how much autonomy they may have, cannot operate in a void or completely independent of each other and must consult and agree on policies. *Id.* at 83-84. In reversing the district court's ruling that Seagram was capable of conspiring with its divisions, the court of appeals held that to adopt any other rule would in effect hand plaintiffs "on a silver platter, an automatically self-proving conspiracy." *Id.* at 84.

This same logic applies in the case of parent-subsidiary relations. Indeed, as the court below recognized, "there may be little difference between a wholly-owned subsidiary and a fully integrated division." *Copperweld*, 691 F.2d at 316. Obviously, wholly-owned subsidiaries cannot operate independently of their parents and also must consult and agree on policies. But under the literal rule of *Kiefer-Stewart* and *Perma Life*, such consultations can easily be turned into the stuff of an antitrust claim. For example, if the subsidiary is the sales arm or agent for the parent, the parent may well direct the subsidiary as to the price at which its products should be sold, thereby exposing itself to a potential price-fixing suit from a customer. Likewise, if a parent owns two subsidiaries which sell competing products, assigns them territories and directs that they not compete against each other, all three could be charged with a horizontal conspiracy in restraint of trade. Similarly, if affiliated companies follow parallel pricing and marketing policies, they could conceivably be sued on a theory of conscious parallel action with plus factors.[20] The manufacturer who orders a wholly-

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20 *See, e.g.*, Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309 (3d Cir. 1975). "Plus factors" refer to the additional elements that must be demonstrated before a factfinder may permissibly infer a conspiracy from evidence of parallel business conduct. These include, *inter alia*, (1) a

owned subsidiary to cut back or shut down its production or to refuse to deal with certain customers or in certain territories could also be exposed to treble damage liability, despite the fact that such decisions are frequently made for sound business reasons. Foreign corporations that operate in the United States through wholly-owned subsidiaries would likewise be at risk under the Sherman Act if they dictate to whom their subsidiaries may sell or instruct the subsidiaries to refuse to deal with a third party. The list of such everyday actions that could become potential sources of violation is virtually endless. As in the case of a corporation and its divisions, the inevitable necessary communications among a parent and its subsidiaries or between affiliates would become self-proving conspiracies.

The courts have also uniformly concluded that a corporation cannot conspire with its officers or directors under Section 1 because it necessarily must act through its agents.[21] To allege a conspiracy between a corporation and its officers is to accuse the corporation of conspiring with itself.[22] There is no sound reason why the rule should be any different when a parent acts through the officers of its wholly-owned subsidiary—who more often than not are also officers of the parent itself, as is the situation in the present case.

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finding that the business conduct at issue is not in the economic interests of the defendants, and (2) additional evidence of improper motivation in entering the agreement. *Id.* at 1314.

21 *See, e.g.*, H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 287 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 654 n.7 (5th Cir. 1977); Morton Bldgs. of Neb., Inc. v Morton Bldgs., Inc., 531 F.2d 910, 917 (8th Cir. 1976); Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

22 *E.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

Not only does the intra-enterprise conspiracy rule fail to explain why antitrust law should afford different treatment to agreements between corporations and their divisions, on the one hand, and agreements between corporations and their subsidiaries, on the other; rigorous enforcement of the rule would simply lead corporations to convert subsidiaries into divisions, with no additional competition between the affiliated entities. What is more, the doctrine ignores the essential fact that there is nothing inherently anticompetitive about the use of corporate subsidiaries which are formed in response to a variety of legitimate legal and financial considerations completely unrelated to antitrust concerns.[23] Certain advantages of doing business through a subsidiary may well result in economic efficiencies that strengthen external competition in the marketplace,[24] as the court of appeals recognized below.[25] After all, the principal concern of antitrust is with market competition, where separate, independent businesses vie against one another for public patronage, not with the internal relationships or organization of a company. To the extent that a company is able to cut costs and distribute its product

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23 Among reasons cited for doing business through a subsidiary rather than a division are: (1) greater managerial and financial flexibility; (2) increased efficiencies in production or distribution; (3) tax advantages; (4) easier access to new capital; (5) expansion into a new territory or country where local law prohibits or makes onerous operation through the parent; (6) limitation of tort and contract liability; (7) facilitation of resort to various accounting methods, tax credit elections, or accounting periods most suitable to specialized needs; (8) facilitation of or avoidance of antidiscrimination limitations on pension and profit-sharing plans; and (9) maintenance of the goodwill or *esprit de corps* associated with a particular subsidiary. *See, e.g.*, McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 186 (1955); Willis & Pitofsky, Antitrust Consequences Of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20, 27-28 (1968); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 728-29 (1977).

24 Indeed, Kaiser formed its subsidiary KASCI to minimize state tax liabilities which reduced its cost of doing business.

25 *Copperweld*, 691 F.2d at 317 & n.7.

through a wholly-owned subsidiary because of tax or labor advantages that result from separate incorporation, competition may intensify. A corporation may decide to create a subsidiary in order to enter into a new market that it otherwise would not enter without the advantages that separate incorporation provides. In such circumstances, competition is strengthened and consumers benefit. The current rule in our view is clearly counterproductive in practice and is without any redeeming virtues.

C. The Alternative Formulations of the Intra-Enterprise Rule Are Unsatisfactory.

Respondent has proposed that the Court read the extensive case law which has developed in this area as enunciating a distinction between agreements that affect only the internal affairs of the parent and the subsidiary and agreements that affect third parties. In addition, the Seventh Circuit, as well as the Eighth and Ninth Circuits, has adopted an "all the facts and circumstances" test, which is designed to limit the breadth and reach of *Kiefer-Stewart* and *Perma Life*. Additional alternative tests have also been proposed and applied by the courts. However, none of these is in the final analysis satisfactory because none avoids the central problem of the doctrine—its lack of rationale and of any predictability.

We turn first to the rule urged by respondent. Respondent's attempt to distinguish between activities dealing with internal management and those directed at third parties ignores the inescapable fact that decisions involving marketing, sales, distribution and the like will almost always affect competitors or customers. A parent's decision, for example, that a subsidiary should lower its price to increase its volume, may well take business away from competitors who do not meet this competition and who may claim that the pricing decision was predatory in nature and the product of a conspiracy aimed at driving them out of business. A decision by a manufacturer that a subsidiary should cut distribution costs by withdrawing from a certain geographical area or refuse to sell to a class of cus-

tomers likewise affects third parties. While respondent urges that this is not a problem because the courts can distinguish between an "external restraint of trade" and an "external effect" incidental to internal decisionmaking,[26] this is a distinction without a difference, because every treble damage plaintiff, as in the present case, will treat every decision as having the effect of restraining trade.

Respondent's proposed test is similar to that advanced by the Report of the Attorney General's National Committee to Study the Antitrust Laws, which "disapprove[d] any application of [the intra-enterprise conspiracy] doctrine to joint action between members of a corporate family not intended to or resulting in *coercive* undue restraint on their customers or competitors."[27] Like respondent's approach, this standard reflects a difference in words that produces no difference in result. The majority of intra-enterprise agreements are likely to have some effect on third parties. Emphasis on the effect on third parties ignores the fact that Section 1 permits a host of single firm actions that adversely affect third parties. How does one determine if the effect is "coercive" or not? What is the basis for holding that behavior having the same effect is lawful when engaged in by a company with its divisions, but is unlawful when engaged in by a parent and its wholly-owned subsidiary? By what alchemy does a lawful unilateral refusal to deal become coercive when the intra-enterprise fiction is invoked?

Nor does the "all the facts and circumstances" test which the Seventh Circuit sought to apply below provide a more satisfactory approach. As the court of appeals itself recognized, the rule is necessarily uncertain because it involves the presence or absence of various unranked factors, which are not set in concrete. *Copperweld,* 691 F.2d at 318. The jury is given free rein to consider a whole host of variables which makes it

26 Respondent's Brief In Opposition, at 17 n.12.

27 Report of the Attorney General's National Committee to Study the Antitrust Laws, 35 (1955) (emphasis added).

virtually impossible to predict what facts will satisfy the test. The resulting uncertainty, once again, leaves corporations at risk for antitrust liability for actions which taken by a corporation and its divisions would clearly be lawful. Moreover, the way to avoid liability under the test is to impose tight controls over the subsidiary, which may well destroy the very reasons for having the subsidiary in the first place: a reasonable degree of autonomy in the subsidiary's operation. In addition, the test will not encourage independence of action on the part of subsidiaries, which presumably is the very purpose of holding affiliated corporations subject to Section 1 liability, with the resultant economic loss in the operation of the modern corporation.

The "holding out as competitors" rule suffers from the same defect as the "all the facts and circumstances" test—the lack of clarity as to what criteria constitute a "holding out". Nor has any compelling rationale ever been advanced for the doctrine. It first surfaced in *Kiefer-Stewart* where the Court emphasized that the two corporations had held themselves out as competitors. 340 U.S. at 215. However, no explanation was offered as to the reason why this fact should be deemed significant. The only rationale that has been suggested is that it is somehow deceptive for corporations which are affiliated to hold themselves out as competitors if they do not in fact compete.[28] Yet none of this Court's decisions, nor those of any of the lower courts in the intra-enterprise conspiracy area, has suggested that the public was deceived or that eliminating deception was the object of the lawsuit or, indeed, of Section 1. To the extent that there may be circumstances in which corporations are unfairly attempting to gain a competitive advantage by concealing their affiliation with a subsidiary, Section 5 of the FTC Act, 15 U.S.C. § 45, appears to provide an existing adequate remedy.[29] Nonetheless, we note that if this Court should now

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28 Willis & Pitofsky, Antitrust Consequences Of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20, 37-38 (1968).

29 *See, e.g.*, FTC v. A.A. Berry Seed Co., 2 F.T.C. 427 (1920); FTC v. Armour & Co., 1 F.T.C. 430 (1919); FTC v. Fleischmann Co., 1 F.T.C. 119 (1918).

interpret the holdings of *Kiefer-Stewart* and *Perma Life* to apply only where corporations have held themselves out as competitors, the verdict below, and in Kaiser's case, must be reversed. Copperweld is a conglomerate that does not compete with Regal. Kaiser and KASCI were a vertically integrated enterprise which did not compete with each other. In neither case is there any evidence that the companies ever made any representation to the public that they competed with their subsidiaries.

In sum, none of the tests provides any sure guidance to predict in advance what structural relationship between a parent and its wholly-owned subsidiary will survive antitrust scrutiny.

There is no basis for injecting uncertainty into the structural organization and arrangements of business entities, which is the consequence of the present state of intra-enterprise conspiracy law. The law should be crystal clear so that businesses can determine on sound economic grounds the form their organization should take—rather than to be in the parlous condition under present law where in a suit in one circuit, the parent and subsidiary may be held incapable of conspiring while in actions in other circuits they may be held liable for treble damages for exactly the same conduct. This hardly is the way to breed respect for the law or to discourage the unnecessary burgeoning of litigation in the federal courts.

The simple and dispositive fact is that there is no rational basis for the intra-enterprise conspiracy doctrine. What sense is there to attempt to use Section 1 to require independent behavior when a corporation may lawfully avoid the rule by eliminating any semblance of independence by the device of converting its subsidiary to a division? If the ownership of one corporation by another is the result of an acquisition, as opposed to internal growth, it may be challenged under Sections 1 and 2 of the Sherman Act or under Section 7 of the Clayton Act, 15 U.S.C. § 18. If the resulting concentration is lawful because it does not unreasonably restrain trade, is not an attempt to monopolize, does not create unlawful monopoly power or substantially lessen competition, then it is entirely

artificial to hold that the manner in which the parent chooses to exercise control over the subsidiary has antitrust consequences.[30]

II. Nothing In The Legislative History Of The Sherman Act Or In This Court's Early Decisions Interpreting The Act Requires A Result Different Than That Which Petitioners Request Here.

Respondent contends that the intra-enterprise conspiracy doctrine is supported by the legislative history of the Sherman Act.[31] Neither its references nor the entire legislative history of the statute provide any support for this extraordinary assertion. On the contrary, the legislative history indicates quite clearly that what concerned Congress was the cartel-like combination of pre-existing businesses or their combination under common ownership, with aggregations of monopoly power strangling trade and commerce. Congress was not concerned with the need to regulate or outlaw parent-subsidiary relations or those of affiliates.[32] Indeed, the modern corporations with multiple divisions and subsidiaries did not even exist at that time.

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30 Thus while both the court of appeals below, *Copperweld*, 691 F.2d at 318-20, and respondent, Respondent's Brief In Opposition at 16, urge that the jury's verdict is rational because the record indicates that petitioners used their combined economic power to exclude Independence from the market, they ignore the fact that it would have been perfectly lawful under the Sherman Act for Copperweld, had Regal been a division, to have exercised the same amount of market power. Indeed, if the same conduct occurred while Regal was a division of Lear Siegler, there would have been no liability.

31 Respondent's Brief In Opposition at 9; Respondent's Supplemental Brief In Opposition at 4, 8.

32 Senator Sherman himself stated that he was "not opposed to combinations in and of themselves" and did "not care how much men combine fo proper objects. . . ." 21 Cong. Rec. 2569 (1890), *reprinted in* E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes, 177 (1978). Senator Sherman was concerned about combinations that "[embrace] the great body of all the corporations engaged in a particular industry. . . ." 21 Cong. Rec. 2457 (1890), Kintner at 117.

Respondent's second argument is that the rule of *Kiefer-Stewart* and *Perma Life* finds support going back as far as the *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904) and *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911) cases. This is not so. In both cases, at issue was the trust or holding company device, which had been employed as a means of avoiding the contract, combination or conspiracy provisions of Section 1 of the Sherman Act. In both cases, the holding companies at issue were the product of the merger of previously separately owned companies which, when combined under common ownership, substantially lessened competition or achieved monopoly power. This is a far cry from *Kiefer-Stewart* and *Perma Life* where there was no allegation that either defendant achieved monopoly power by acquiring its subsidiaries or combining with them.

Finally, respondent contends that petitioners seek an exemption from the antitrust laws which only Congress, not this Court, can provide. Once again, there is no support for this position. First, the rule that petitioners and *amici* urge this Court to adopt would in no way exempt companies operating subsidiaries from liability under the Sherman Act. Section 1 could still be invoked, along with Section 2 of the Sherman Act and Section 7 of the Clayton Act, by the Government or private parties, to challenge combinations and acquisitions which unreasonably restrain trade, constitute monopolization or substantially lessen competition. All the rule petitioners urge would do is provide that corporations that have lawfully acquired other companies or extended their operations through newly created subsidiaries should not be subject to Section 1 liability for choosing to do business through subsidiaries rather than divisions.

Second, it is noteworthy that despite respondent's position that only Congress, not this Court, is free to clarify the law of intra-enterprise conspiracy, it nevertheless has itself urged the Court to do so. Thus, as we have previously noted, respondent does not urge the Court to affirm the literal view of intra-enterprise conspiracy suggested by *Kiefer-Stewart* and *Perma*

Life. Clearly, if the Court is free to refine its prior holdings as is suggested by respondent, it is also free to reject the doctrine once and for all. In so ruling, the Court would do no more than that which numerous lower courts have done in agonizing over how to apply *Kiefer-Stewart* and *Perma Life* to the cases before them and in so doing developed at least five distinct lines of authority. Far from creating an "exemption," such an approach would merely constitute judicial recognition that Congress did not intend to outlaw intra-enterprise joint conduct when it enacted Section 1 of the Sherman Act.

CONCLUSION

The Court should reaffirm the basic principle of antitrust, which is to protect market competition from restraints imposed by two or more separately owned and managed companies and from attempts to monopolize and monopolization by one or more companies. The Court should hold that a parent and its wholly-owned subsidiary, and affiliated corporations wholly owned by the same parent, are incapable of conspiracy under Section 1 of the Sherman Act as a matter of law.

Respectfully submitted,

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